90-231

CASE NO. _____

IN THE

Supreme Court of the United States

October Term, 1989

STATE OF FLORIDA,

Petitioner,

vs.

DUANE EUGENE OWEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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July 31, 1990

QUESTION PRESENTED FOR REVIEW

WHETHER, PARTICULARLY IN VIEW OF THE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS, *MICHIGAN V. MOSLEY,* 423 U.S. 96 (1975), SHOULD BE REVISITED TO ADDRESS THE UNRESOLVED FIFTH AMENDMENT ISSUE OF WHETHER MERELY SAYING "I DON'T WANT TO TALK ABOUT IT" — MEANING A PARTICULAR FACT OR POINT — TRIGGERS THE TYPE OF PROHIBITION ON FURTHER POLICE INITIATED CONVERSATION RECOGNIZED IN SIXTH AMENDMENT CASES SUCH AS *EDWARDS V. ARIZONA,* 451 U.S. 477 (1967); OR ALTERATIVELY, WHETHER *MICHIGAN V. MOSLEY* SHOULD BE ABANDONED.

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STATUTES AND CONSTITUTIONS

CASE NO. _____

IN THE

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October Term, 1989

STATE OF FLORIDA,

Petitioner,

vs.

DUANE EUGENE OWEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The decision of the Supreme Court of Florida, rendered on March 1, 1990, is reported at 560 So.2d 207 (Fla. 1990). It is reproduced in the Petitioner's appendix at A-3. Rehearing was denied on May 2, 1990. App. A-2. The state trial court's oral findings and ruling denying the defendant's motion to suppress are reproduced in the Petitioner's Appendix at A-22.

JURISDICTION

The opinion and judgment of the Supreme Court of Florida was rendered on March 1, 1990. The Petitioner timely filed its petition for rehearing. The motion for rehearing was denied on May 2, 1990. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1257.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, *United States Constitution* provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, *United States Constitution,* provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty or property, without due process of law. . .

STATEMENT OF THE CASE AND FACTS

The opinion of the Supreme Court of Florida details the factual background to this crime. *Owen v. State*, 560 So.2d 207 (Fla. 1990). (A-3). Owen was convicted of burglary, sexual battery and first-degree murder of a young baby-sitter in March, 1984 in Delray Beach, Florida. He was picked up by police in Boca Raton, Florida, on suspicion of burglary. Id. at 207. After he was booked, he initiated contact with police and was interrogated "relative to various crimes which occurred in the spring of 1984." *Id.* The Supreme Court of Florida noted:

> During these interrogations, Owen expressed contempt for lawyers and a desire to help clean up crimes with which he had been charged or suspected. He specifically stated that he did not want a lawyer present but he asked that a certain officer (Woods) from Delray Beach who knew him from previous encounters be present for the interrogation.

Id.

During this conversation, Respondent said he knew he was implicated in a separate homicide and that he had been found out through the fingerprint in the book. Although denouncing any involvement in the instant murder, Respondent, after listening to the evidence collected in the case, asked Officer Lincoln questions about the evidence and inquired whether that was all they have against him. At this point, the two challenged statements. "I'd rather not talk about it," and "I don't want to talk about it," were made by Respondent. (The pertinent portions of the conversations are detailed in the dissenting opinion of Justice Grimes). (A-11)

A break was taken shortly after the last statement of Respondent. After the break, Respondent inquired about the possibility of the officers bringing his brother to see him after that day and expressed other personal concerns. He then acknowledged that the officers had enough evidence to charge him with the second murder and proceeded to confess.

The conviction and death sentence were reversed on the basis of the statements given after the response, "I'd rather not talk about it." *Id.* at 211.

The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

In *Michigan v. Mosley,* 423 U.S. 96 (1975), this Honorable Court held that *Miranda v. Arizona,* 384 U.S. 436 (1966), does not create a per se proscription against all further interrogation once a defendant expresses an equivocal desire to remain silent. Relying on *Mosley,* federal courts have decided that a defendant may selectively waive his *Miranda* rights, deciding to "respond to some questions but not others." *See, Bruni v. Lewis,* 847 F.2d 561, 563 (9th Cir. 1988); *cert. denied,* ___ U.S. ___, 109 S.Ct. 403 (1989); *United States v. Thierman,* 678 F.2d 1331, 1335 (9th Cir. 1982); *United States v. Lorenzo,* 570 F.2d 294 (9th Cir. 1978); *United States v. Ford,* 563 F.2d 1366 (9th Cir. 1977), *cert. denied,* 434 U.S. 1021 (1978).

Through the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation. *Mosley,* 423 U.S. 96, 103-04. In the case at bar, Respondent chose which questions he desired to answer in order that he could find out the amount of evidence the police had on him, on the Slattery murder, before he could

decide, in his own mind, whether he should confess to this murder as well. 560 So.2d at 210-11. There is no evidence in the record that the police did not completely respect the limitations set by Respondent. *Id.* Thus, this case presets a factual situation analogous to the one hypothesized by Mr. Justice White in his *Mosley* dissent:

> The majority's rule may cause an accused injury. Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately — if it were true — that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know — if it were true — that (1) the case against him was unusually strong (2) and that his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would rebound to his benefit in the form of a reduced charge.

423 U.S. at 109. *See, also, Thierman, supra,* 678 F.2d at 1335.

Miranda should not preclude officers, after a defendant has invoked his rights, from informing the defendant of evidence against him or of other "circumstances which might contribute to an intelligent exercise of his judgment." *United States v. Rodriguez-Gastelum,* 569 F.2d 482, 486-488 (9th Cir.), *cert. denied,* 436 U.S. 919 (1978).

The developing case law supports Justice White's *Mosley* dissent by holding that informing a defendant of circumstances which contribute to an intelligent exercise of his judgment is normally attendant to arrest and custody. *Thierman, supra,* 678 F.2d at 1334 n. 3. *See also, Johnson v. Zerbst,* 304 U.S. 458 , 464 (1938).

It is respectfully submitted that this Court should reexamine and revisit *Mosley* because it now leads to absurd results. The Supreme Court of Florida has reached the type of result Justice White feared in his *Mosley* dissent:

> In justifying the implication that questioning must inevitably cease for some unspecified period of time following the exercise of the "right to silence", the majority says only that such a requirement would be necessary to avoid "undermining" "the will of the person being questioned." Yet, surely a waiver of the "right to silence" obtained by "undermining the will" of the person being questioned would be considered an involuntary waiver. Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the fact-finding process of highly probative information for no reason at all.

Id., 423 U.S. at 111. This is precisely what occurred in the instant case. As noted by the Supreme Court of Florida, the Respondent was asked "a relatively insignificant detail" question to which he responded, "I'd rather not talk about it." 560 So.2d at 211. Rather than exploring what Owen meant by this remark, the police "urged him to clear matters up." Owen then began responding with incriminating information. He also asked questions of the police. *Id.* When asked another relatively insignificant detailed question, Owen again said, "I don't want to talk about it." The police urged him to again clear things up. *Id.*

Citing two cases, *Long v. State*, 517 So.2d 664 (Fla. 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988), and *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified*, 781 F.2d 185 (11th Cir.), *cert. denied*, 479

U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986), the Supreme Court of Florida held that the absence of any Fifth or Sixth Amendment violation was irrelevant to the question of whether Owen's confession should be excluded from evidence. The court held that the mere violation of *Miranda* procedures compelled the finding of error which was then to be reviewed under the harmless constitutional error standard of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Id.* Neither case is dispositive of the issue presented and each exhibits the continuing frustrations and difficulties courts have encountered as cases develop in the post-*Miranda* era. For example, *Long v. State* involved a finding of violation of a defendant's Sixth Amendment right to invoke counsel. The Supreme Court of Florida relied on *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *Miranda v. Arizona, supra,* and *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), to find that the police's failure to clarify Long's mental state after he indicated "I think I might need an attorney", 517 So.2d at 667, violated Long's Sixth Amendment right. This case implicates no Sixth Amendment concerns. Thus, the reliance upon *Long* is wholly inappropriate and in conflict with the very cases cited by the court in *Long, i.e., Miranda, Edwards,* and *Rhode Island v. Innis.*

The Supreme Court of Florida's reliance on *Martin, supra,* is equally troubling. In *Martin,* the defendant told police during his interrogation that he did not want to immediately continue the discussion but rather "Can't we wait until tomorrow?" 770 F.2d at 923. In response to that question, the police responded, "Let's go on." *Id.* In a troubling bit of logic, the Eleventh Circuit Court of Appeals reasoned that Martin's request to hold off further questioning until the next day was equivocal to invocation of his Sixth Amendment right to counsel. Specifically, the court found as follows:

> It is true that Martin's request "Can't we wait until tomorrow," was an equivocal invocation of his right to cut off questioning, and that Martin never explicitly refused to answer any more questions. Nevertheless, Detective Anderson's continuance of the interrogation was improper. We previously have held that equivocal invocations of the right to counsel immediately limit the scope of police questioning to "clarifying the equivocal request."
>
> * * *
>
> We see no reason to apply different rule to equivocal invocations of the right to cut off questioning.

Id. at 923-924. In reaching this conclusion, the Eleventh Circuit Court of Appeals flatly stated that its position was in direct conflict with the position the Ninth Circuit Court of Appeals reached in *United States v. Thierman, supra. Id.* at 924 n. 6. In *Thierman,* the court held:

> The record supports the district court's conclusion that Thierman knowingly and voluntarily waived his right to remain silent. Twice Thierman was advised of his *Miranda* rights and each time he agreed to answer some questions and refused to answer questions on certain topics. A person in custody may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others. *United States v. Lopez-Diaz,* 630 F.2d 661, 664 n. 2 (9th Cir. 1980); *United States v. Lorenzo,* 570 F.2d 294, 297-98 (9th Cir. 1978). Through the exercise of the option to terminate questioning, a suspect can control the subjects discussed, the time at which questioning occurs, and the duration of the interrogation. *Michigan v. Mosley,* 423 U.S. 96, S.Ct. , L.Ed.2d (19). Thierman chose only to limit the subjects

> discussed and there is no evidence in the record that the police did not completely respect that limitation.

678 F.2d at 1335. Clearly, the facts outlined in the Supreme Court of Florida's opinion below mirror the facts in *Thierman*. After numerous and detailed presentation of *Miranda* warnings by the police, Respondent continually engaged in a question and answer session with the police officers during which he twice responded to fact-specific limited questions by saying, "I'd rather not talk about it." 560 So.2d at 211.

The Supreme Court of Florida's reliance on *Martin* and its Sixth Amendment based analysis is wholly inconsistent with *Thierman, supra,* and with *Michigan v. Mosley, supra.* As noted above, this case is the perfect example of why Justice White's dissent in *Michigan v. Mosley* provides an appropriate standard for reviewing non-Sixth Amendment announcements made by suspects in police custody.

In this case, the record reveals Respondent was a bright person, with some years of college education, who had once aspired to be a police officer. He enjoyed talking "law" with the officers investigating the crimes he was suspected of having committed. As the court below found:

> Through the interrogation sessions, Owen had indicated his desire to confess to crimes for which he felt the police had sufficient evidence to convict. Consequently, there evolved a procedure whereby the police officers would present their evidence and attempt to persuade him that they had the necessary proof.

560 So.2d at 210.

The opinion of the Supreme Court of Florida indicates that Respondent, at all times including the June 21st interview, was in "control [of] the time at which questioning occurs, the

subject discussed, and the duration of the interrogation." *Mosley,* 423 U.S. 96, 103-104. 560 So.2d at 210-11. Dissenting in this case, Justice Grimes noted:

> While the police in this case did not immediately cease questioning Owen on the two topics he indicated a reluctance to discuss — whether the house had been predetermined and where the bicycle had been left — their follow-up questions can fairly be seen as attempts to determine what Owen did mean. In any event, Owen did not make meaningful responses to these inquiries and the discussion shifted to other aspects.

560 So.2d at 216.

Through the conversations between the officers and Respondent on the six different occasions, Respondent had established a pattern of answering the questions he wished to and confessing only when he felt good and ready, but after he had ascertained in his own mind that the police had enough evidence to charge him with the particular crime.

The Court should take this case because it is abundantly clear that the original promise of *Miranda,* providing each citizen with a shorthand accounting of his federal constitutional rights, has been, over time, firmly rooted in the American culture. However, the lower courts have continued to allow this core function of *Miranda* to be mutated and misconstrued to the point where cases such as *Michigan v. Mosley* now provide a criminal defendant with a sword rather than a shield for his battle against governmental authority. If cases such as *Owen* cannot be harmonized with the standard set forth in *Michigan v. Mosley,* then the Petitioner respectfully suggests that *Michigan v. Mosley* be overturned. A good starting place for such analysis would be Mr. Justice White's dissenting opinion as discussed above. Assuming the Court is not willing to take such drastic

action, the Petitioner would respectfully suggest that the case be accepted in order to resolve conflict between *Martin v. Wainwright* from the Eleventh Circuit and *Thierman* from the Ninth Circuit. See dissent of Justice Grimes at 560 So.2d 214.

It should be enough to find on appeal that none of Respondent's federal constitutional rights were violated. While acknowledging that truth, the Supreme Court of Florida has still placed him in a position, by suppressing his statements and confessions, that he may literally get away with murder.

CONCLUSION

For these reasons, the Petitioner, the State of Florida, respectfully prays this Honorable Court will accept this case for further review.

Respectfully submitted,

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CASE NO. _____

IN THE

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October Term, 1989

STATE OF FLORIDA,

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DUANE EUGENE OWEN,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Supreme Court of Florida

Wednesday, May 18, 1990

DUANE EUGENE OWEN,

Appellant,

vs. – Case No., 68,550

STATE OF FLORIDA,

Appellee.

Circuit Court Case No. 84-4014-CF A02
(Palm Beach County)

Appellee's Motion to Stay Mandate is hereby granted and proceedings in this Court and in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida are hereby stayed pending filing and resolution of review in the United States Supreme Court.

A True Copy TC

TEST cc: Hon. John B. Dunkle, Clerk
Hon. Richard B. Burk, Judge
Mr. Duane Eugene Owen
Theodore S. Booras, Esquire
Celia Terenzio, Esquire

By:_____/s/_____
Sid J. White
Clerk, Supreme Court

Supreme Court of Florida

Wednesday, May 2, 1990

DUANE EUGENE OWEN,

Appellant,

vs. Case No., 68,550

STATE OF FLORIDA,

Appellee.

Circuit Court Case No. 84-4014-CF A02
(Palm Beach County)

The Motions for Rehearing, having been considered in light of the revised opinion, are hereby denied.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur as to Appellant's Motion

OVERTON, McDONALD, SHAW, BARKETT and KOGAN, JJ., Concur, but EHRLICH, C.J., and GRIMES, JJ., Dissent as to Appellee's Motion

A True copy JB

TEST: cc: John B. Dunkle, Clerk
Hon. Richard B. Burk, Judge
Duane Eugene Owen, Pro Se
Theodore S. Booras, Esquire
Georgina Jimenez-Orosa, Esquire

Sid J. White
Clerk Supreme Court

Supreme Court of Florida

REVISED OPINION

NO. 68,550

DUANE EUGENE OWEN, *Appellant,*

vs.

STATE OF FLORIDA, *Appellee.*

[March 1, 1990]

PER CURIAM.

Appellant Owen was convicted of burglary, sexual battery, and first-degree murder. The jury recommended and the judge imposed a death sentence for the murder. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

The victim was baby-sitting for a married couple on the evening of March 24, 1984, in Delray Beach. During the evening, she called home several times and spoke with her mother, the last call taking place at approximately 10 p.m. When the couple returned home, just after midnight, the lights and the television were off and the baby-sitter did not meet them at the door as was her practice. The police were summoned and the victim's body was found with multiple stab wounds. There was evidence that the intruder entered by cutting the screen to the bedroom window. He then sexually assaulted the victim. A bloody footprint, presumably left by the murderer, was found at the scene.

In late May 1984, Owen was apprehended in Boca Raton after he was identified as a burglary suspect. Routine booking disclosed that there were outstanding warrants against him and while being held on these charges, he initiated

contact with the police and was interrogated relative to various crimes committed on June 3, 6, 7, and 8. He was also questioned relative to a May 29, 1984, burglary, sexual battery, and murder in Boca Raton. During these interrogations, Owen expressed contempt for lawyers and a desire to help clean up crimes with which he had been charged or suspected. He specifically stated that he did not want a lawyer present but he asked that a certain officer (Woods) from Delray Beach who knew him from previous encounters be present for the interrogation. After confession to numerous burglaries, sexual batteries, and lesser crimes, he refused to talk further to the police about the Boca Raton murder and terminated the interrogation. On June 18, he reinitiated contact with the police and renewed his spate of confessions. He also corrected and amplified earlier confessions. On June 21, the Delray Beach police obtained an inked impression of Owen's footprints and the Boca Raton police informed him that, based on fingerprints taken from the crime scene and other evidence, they were charging him with first-degree murder. After the Boca Raton police presented their evidence to Owen, he confessed to the May 29 burglary, sexual battery, and murder. His account of this crime was remarkably similar to his earlier confessions to three crimes where he removed his clothes, committed a burglary, and either choked or bludgeoned sleeping victims into unconsciousness before committing sexual battery.

Immediately after the above confession to the May 29 Boca Raton murder, the Delray Beach police interrogated Owen relative to the March 24 Delray Beach crime. He first denied any knowledge of this crime, but confessed after the police confronted him with the bloody footprint from the crime scene and the inked impression of his foot taken earlier that day. The details were again remarkably similar to those of the earlier confessions.

At trial, the state did not attempt to introduce similar fact evidence, but relied on Owen's confession and corroborating evidence. An expert on podiatry testified that the bloody footprint was consistent with Owen's, but did not identify him to the exclusion of others.

The primary issue raised by Owen concerns the admissibility of his confession. He contends that (1) the confession was compelled by improper psychological coercion in violation of his fifth amendment right to remain silent, and (2) the police violated *Miranda v. Arizona*, 384 U.S. 436 (1966), by continuing to question him after invoked the right to terminate questioning. He claims that the police had no well-founded suspicion upon which to stop and seize him on the street and that all subsequent confessions were thereby tainted. This argument is without merit. Owen was the subject of outstanding warrants and had been identified in a photographic lineup as a burglar. The officer who stopped him had been given a photograph and specifically alerted to watch for him in his known habitat. The police had more than founded suspicion, they had probable cause.

Owen's more serious argument is that he was psychologically coerced into confessing by extended interrogation sessions, feigned empathy, flattery, and lengthy discourse by the police. These interrogation sessions were videotaped and we have, as did the trial judge, the benefit of actually viewing and hearing them. It is clear from these tapes that the sessions were initiated by Owen, who was repeatedly advised of his rights to counsel and to remain silent. Moreover, he acknowledged on the tapes that he was completely familiar with *Miranda* rights and knew them as well as the police officers. It is also clear that the sessions, which encompasses six days, were not individually lengthy and that Owen was given refreshments, food, and breaks during the sessions. The tapes show that the confession was entirely voluntary under the fifth amendment and that no

improper coercion was employed. *Martin v. Wainwright,* 770 F.2d 918, 924-28 (11th Cir. 1985), *modified,* 781 F.2d 185 (11th Cir.), *cert. denied,* 479 U.S. 909 (1986).

Owen next argues that even if the confession was voluntary under the fifth amendment, it was nevertheless obtained in violation of the procedural rules of *Miranda.* On this point, we agree. Throughout the interrogation sessions, Owen had indicated his desire to confess to crimes for which he felt the police had sufficient evidence to convict. Consequently, there evolved a procedure whereby the police officers would present their evidence and attempt to persuade him that they had the necessary proof. On June 21, after the Boca Raton police presented the fingerprint evidence and the similarity of the crime to earlier burglary rapes to which Owen had confessed, he acknowledged his guilt and responded to further questions. Thereafter, the Delray Beach police took up questioning on the instant crime. After police presented evidence on the "matched" footprints, alluded to evidence they expected to develop and the close similarity of the crime to the Boca Raton murder and earlier burglaries and rapes, Owen closely studied the footprint impression and appeared to acknowledge the conclusiveness. However, when police inquired about a relatively insignificant detail, he responded with "I'd rather not talk about it." Instead of exploring whether this was an invocation of the right to remain silent or merely a desire not to talk about the particular detail, the police urged him to clear matters up. He was soon responding with inculpatory answers and asking questions of his own. After further exchanges and a question on another relatively insignificant detail, Owen responded with "I don't want to talk about it." Again, instead of exploring the meaning of the response, the police pressed him to talk.

When presented with the motion to suppress, the trial judge initially indicated that the continuation of the ques-

tioning after the responses appeared to be a clear violation of *Miranda,* rendering the statements thereafter inadmissible. However, after reviewing the complete interrogation sessions, the judge concluded that the responses were not an invocation of the right to remain silent. The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling. *McNamara v. State* 357 So.2d 410, 412 (Fla. 1978). The state urges that on the totality of the circumstances, we should affirm the ruling below. Counterposed to this argument is the well-established rule that a suspect's equivocal assertion of a *Miranda* right terminates any further questioning except that which is designed to clarify the suspect's wishes. See *Long v. State,* 517 So.2d 664 (Fla. 1987), *cert. denied,* 108 S.Ct. 1754 (1988), and cases cited therein; and *Martin,* where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of *Miranda* rights, the court held that continued questioning was reversible error under *Miranda.* Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement. Such error is not, however per se reversible but before it can be found to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. State,* 386 U.S. 18, 24 (1967); *Martin v. Wainwright.* Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt. Even though there was corroborating evidence, Owen's statements were the essence of the case against him. We accordingly reverse

Owen's convictions on the basis of inadmissible statements given after the response, "I'd rather not talk about it."[1]

We address additional issues which may recur should a retrial occur. In accordance with section 921.143, Florida Statutes (1983), the trial judge heard testimony from the victim's family on the impact of the crime after receiving the jury's advisory recommendation of death. The judge did not have the benefit of *Booth v. Maryland,* 482 U.S. 496, (1987), and of *Grossman v. State,* 525 So.2d 833 (Fla. 1988), *cert. denied,* 109 S.Ct. 1354 (1989), but nevertheless recognized that victim impact evidence by family members could not be used as an aggravating factor. If a death penalty phase is reached in a retrial, such evidence should not be received.

During the guilt phase, the victim's mother was permitted to testify, over objection, concerning certain corroborating evidence. Owen claims that the evidence was not at issue and that permitting the victim's mother to take the stand was unduly prejudicial. At trial, the basis of the objection was that the mother had been unable to control her emotions during an earlier deposition and her testimony was being presented for the sole purpose of creating improper sympathy. The record does not show that the mother was unduly emotional during her testimony, which corroborated Owen's confession. The mother's testimony meets the relevancy test; we see no error.

Appellant also claims that the jury should have received a special instruction during the penalty phases stressing the extreme importance of the jury's advisory recommendation. In appellant's view, Florida's standard jury instruction denigrates the role of the jury contrary to *Caldwell v. Mississippi,* 472 U.S. 320 (1985). We have previously held,

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1 Statements made before this response do not implicate *Miranda* rights.

contrary to appellant's position, that the standard jury instructions accurately reflect Florida law. *Combs v. State,* 525 So.2d 853 (Fla. 1988).

Owen also argues that the trial court erred in not directing a verdict on the sexual battery charge because the evidence shows that the victim was dead before sexual union and Florida law does not criminalize necrophilia. In support, he cites the testimony of the medical examiner that the victim had "probably" died from her massive wounds before being transported to the bedroom, where appellant confessed that he "raped her, I guess you could say."

In defining sexual battery, section 794.011, Florida Statutes (1983), refers to the victim as "another" and as "the person." We are satisfied that under the legislative definition a victim must be alive at the time the offense commences. Sexual union with a previously deceased person, as in a morgue, would not meet the definition of sexual battery. However, we do not believe that the legislature intended that a person who is alive at the commencement of an attack must be alive at the end of the attack. Here we need not decide this precise issue because the jury was instructed regarding the distinction between sexual battery on a live person and attempted sexual battery on a victim killed in the course of the crime before sexual union is achieved. The verdict of guilt on the sexual battery count resolves this question of fact. In denying the motion for a directed verdict, the trial court relied on the well-established rule that a defendant's motion for acquittal admits "every conclusion favorable to the [state] that a jury might fairly and reasonably infer from the evidence" and the motion should not be granted "unless the evidence is such that no view which the jury may lawfully take . . . can be sustained under the law." *Lynch v. State,* 293 So.2d 44, 45 (Fla. 1974).

Owen has filed two pro se briefs, in addition to the briefs filed by his counsel. Most of the issues raised duplicate those raised by appointed counsel, but one issue merits comment. Owen claims that his trial counsel, who is also serving as his appellate counsel, was ineffective. Although this issue is customarily handled in a 3.850 hearing, it may be raised on direct appeal under rare circumstances where it is preserved and the ineffectiveness is apparent on the face of the record. Refusal to address the issue under such circumstances would be a waste of judicial resources. No such circumstances exist here. *Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla. 1987). Here, there is nothing on the face of the record even remotely suggesting ineffective assistance of trial counsel and appellant repeatedly expressed satisfaction with trial counsel's performance in response to queries from the trial judge. What concerns us is not only that appellant makes such an assertion concerning his current appointed counsel, but also his apparent belief that he is entitled to independently defend his case by submitting pro se briefs without reference to the actions of his appointed counsel. On remand, assuming retrial, the trial judge is directed to clarify this situation and make the appellant aware of *Faretta v. California,* 422 U.S. 806 (1975), and his choices thereunder. We reverse all convictions and remand for retrial.

It is so ordered.

OVERTON, McDONALD, SHAW and KOGAN, JJ., Concur

BARKETT, J., Concurs specially with an opinion, in which KOGAN, J., Concurs

GRIMES, J., Dissents with an opinion, in which EHRLICH, C.J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BARKETT, J., specially concurring.

I concur in the decision to reverse because the interrogation subsequent to appellant's assertion of his right to remain silent was improper. As the *Miranda* Court stressed: "If the individual indicates *in any manner,* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). And, as the Court later explained in *Michigan v. Mosley,* 423 U.S. 96, 104 (1975), the admissibility of statements obtained after a person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was "scrupulously honored." In this case, it was not.

KOGAN, J., Concurs

GRIMES, J., dissenting.

I must respectfully dissent from the holding in this case and that portion of the majority opinion concerning the *Miranda*[2] issue. I do not believe that current case law requires police to cease questioning a suspect simply because, as happened here, the individual expresses some reluctance to confront the details of his crime. Nor do I believe in the context of the extended series of interviews between Owen and police that his two statements — "I'd rather not talk about it," and "I don't want to talk about it" — must be construed as a request for a lawyer or a request to cut off questioning.

Initially, several points need to be emphasized. As the majority touched on its discussion of the first issue, the police questioning of Owen was totally lawful. Often he initiated contact. None of the interview was especially long; Owen never complained about the questioning and never

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2 *Miranda v. Arizona,* 384 U.S. 436 (1966)

directly halted a session. The interviews were brought to a close by the officers, apparently when they felt Owen had told them all he would tell them in that session. The officers' conduct was in no way coercive, though they did attempt to persuade Owen to confess. Owen was not browbeaten or threatened with anything other than the probability that criminal charges would be brought against him. Prior to all sessions, he waived his *Miranda* rights, including the right to consult a lawyer and to have one present.

The two statements Owen made must be seen in the context not only of the conversation during which they occurred but also of the relationship that had built up between Owen and the two policemen who did most of the questioning, Lieutenant Kevin McCoy, Boca Raton Police Department, and Officer Mark Woods, Delray Beach Police Department. This series of interviews was a long cat-and-mouse game between Owen and the detectives; indeed, the game may have begun with the killings.[3] Often he would appear ready to talk about the murders, only to change the subject.

The portrait of Owen that emerges from these interviews is of a person who wanted to impress the officers with his cunning, and with his skill as a criminal. He even alleged that he had taken criminology and crime scene analysis courses at a college while in Michigan. He never exhibited

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3 For example, the Delray Beach victim was stabbed to death and a hammer was found beside here, while the Boca Raton victim was killed by multiple blows with a hammer, a knife being found nearby. While in jail, Owen wrote rhymes that seem intended to tantalize the officers. One went: "Roses are red, white, yellow and pink. To play my game you've got to think." Also, one detective asked Owen to fill in a blank with the number of murder victims. Owen deflected the question but, he said later, drew a square on his styrofoam coffee cup and filled in the number two while he talked. The officer had not noticed the cup.

any reticence in admitting criminal acts generally,[4] and never indicated any desire to speak with an attorney. It is clear from reading the record that Owen did not mean he had changed his mind about talking to police and that he wished to speak with a lawyer before continuing. His comments are those of someone who does not want to face the truth, not someone who seeks legal counsel.

Long v. State, 517 So.2d 664 (Fla. 1987), *cert. denied,* 108 S.Ct. 1754 (1988), which the majority cites for authority, involved a statement: "I think I might need an attorney." The United States Supreme Court has required an immediate cessation of interrogation upon any request by the defendant for an attorney. *Edwards v. Arizona,* 451 U.S. 477 (1981). However, with respect to a suspect's terminating an interrogation where no request for counsel is involved, that Court has said that "[t]hrough the exercise of his option to cut off questioning, he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Michigan v. Mosely,* 423 U.S. 96, 103-04 (1975).

In *United States v. Thierman,* 678 F.2d 1331 (9th Cir. 1982), the court considered the validity of a confession made to the police after the defendant had earlier asked, "Can we talk about it tomorrow?" The court said:

> Twice Thierman was advised of his *Miranda* rights and each time he agreed to answer some questions and refused to answer questions on certain topics. A person in custody may selectively waive his right to remain silent by indicating he will respond to some questions, but not to others.

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4 In fact he admitted, and showed no remorse for, numerous instances of drug abuse, several unreported break-ins, and one incident of "flashing" a young woman on the campus of Florida Atlantic.

United States v. Lopez-Diaz, 630 F.2d 661, 664 n. 2 (9th Cir. 1980); *United States v. Lorenzo*, 570 F.2d 294, 297-98 (9th Cir. 1978). . . .

> The only other event relevant to whether Thierman invoked his right to remain silent occurred when he inquired "Can we talk about it tomorrow?" The district judge was not required to interpret Thierman's questions as an invocation of his right to remain silent. The question is more easily construed as a mere request to postpone interrogation on a single subject than an outright refusal to answer any more questions.

Id. at 1335-36. The Eleventh Circuit Court of Appeals in *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified*, 781 F.2d 185, *cert. denied*, 479 U.S. 909 (1986), disagreed with *Thierman* to the extent that it held that the defendant's statement, "Can we wait until tomorrow?" constituted an invocation of the right to cut off questioning. However, that court did not dispute the *Thierman* court's premise that the defendant's election to remain silent on a single subject does not necessarily require that the interrogation be completely terminated. In fact, the court in *Martin* distinguished *Thierman* by pointing out that in that case the surrounding circumstances "indicated that the suspect's request concerned a particular subject matter and not the interrogation in general." *Martin*, 770 F.2d 924 n. 6.

It seems to me that the instant case is closer to *Thierman*. When Owen made has first statement that the majority finds objectionable, Lieutenant Rick Lincoln, a newcomer to the interview, was talking to him about the similarities between the Boca Raton murder and the one in Delray Beach, while showing him the footprint he left behind in Delray Beach.

OFFICER LINCOLN: . . . . Duane, this is you. This stuff proves it's you.

THE DEFENDANT [OWEN]: Yeah, it looks identical to me.

OFFICER LINCOLN: Sure, it is.

Tell me about it for you, Duane.

I think you need to.

I know you want to.

. . . .

Yeah, you're right, this is you.

When did you first see her?

Now is the time, Duane.

We can't have stuff on this thing.

OFFICER WOODS: It's good enough.

I know what you're thinking.

THE DEFENDANT [OWEN]: That's it, man.

OFFICER WOODS: You're taking a look at it and you're checking it out

THE DEFENDANT [OWEN]: Yeah.

OFFICER WOODS: And that's it. That's the bottom line.

OFFICER LINCOLN: Satisfy yourself right now.

There's a few things —

OFFICER WOODS: Yeah.

OFFICER LINCOLN: — that I have to know, Duane.

A couple pieces of the puzzle don't fit.

How did it come down?

Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT [OWEN]: I'd rather not talk about it.

OFFICER WOODS: Why?

OFFICER LINCOLN: Why?

You don't have to tell me about the details if you don't want to if you don't feel comfortable about that.

Was it just a random thing?

Or did you have this house picked out.

That's what I'm most curious about.

Things happen, Duane.

We can't change them once they're done.

THE DEFENDANT [OWEN]: No.

OFFICER LINCOLN: But you can sure make it easier on two pa-rents that need to know.

OFFICER WOODS: And a whole town full of babysitters that are afraid to go outside.

That's how the kids make their money in the summer.

OFFICER LINCOLN: Had you ever been to that house before?

THE DEFENDANT [OWEN]: That was a big scene over there.

At this point the conversation shifted, with the officers trying to find out if Owen had known the victim or the family for whom she had been babysitting and how long it had taken him to get into the house. They interspersed these questions with statements flattering Owen and with demonstrations of how evidence was sufficient to convict him.

Finally, Owen said he had not been to the murder scene and the subject shifted to where his bicycle had been left:

THE DEFENDANT [OWEN]: How do you know I even had a bike?

You don't even know that .

OFFICER LINCOLN: You tell me you didn't have a bicycle.

See, you won't lie, Duane.

I know you won't lie when you are confronted with the truth.

Now, are you going to tell me you didn't have a bicycle?

I know that much about you now.

You play by the rules. Those rules are important.

We all need rules.

Now did you have a bicycle? Of course, you did.

THE DEFENDANT [OWEN]: I don't want to talk about it.

OFFICER LINCOLN: Don't you think it's necessary to talk about it, Duane?

Two months have gone by already, Duane.

That's a long time. It's a long time for people to work. It's a long time for you to hold it within yourself. It's a long time for people to wonder.

. . . .

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane.

But I do want to know some of the things that shouldn't hurt that much to talk about.

What you did with the bicycle. How long you were outside the house. Those kind of things.

I know what you're reluctant to talk about and I won't press you on that.

THE DEFENDANT [OWEN]: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime, Duane.

And I know you're uncomfortable about talking about certain aspects of it, and I respect that.

Do you know what time it was when you first got to the house?

Do you remember?

OFFICER WOODS: What time was it, Duane?

THE DEFENDANT [OWEN]: Let me take — use the bathroom, first.

OFFICER WOODS: Sure. I have to also.

It is not perfectly clear what Owen meant by his comments, but it is clear from a totality of the circumstances that he did not want to quit talking to the officers about the crime. While the police in this case did not immediately cease questioning Owen on the two topics he indicated a reluctance to discuss — whether the house had been premeditated and where the bicycle had been left — their follow-up questions can fairly be seen as attempts to determine what Owen did mean. In any event, Owen did not make meaningful responses to these inquiries and the discussion shifted to other aspects.

Owen's attitude toward the questioning can be seen graphically in the circumstances surrounding the actual confession. When the questioning reconvened from the break, Officer Woods left to get coffee, leaving Owen and Lieutenant Lincoln alone. Owen mentioned the possibility of visiting with his brother, commented on the fact the he would get bad publicity for facing two counts of first-degree murder, and asked about the possibility of unrelated minor charges being field against him.

OFFICER LINCOLN: I have no idea. See, I'm talking about a homicide here. I don't know about all that other stuff. That's what we're dealing about tonight.

THE DEFENDANT [OWEN]: How come you don't carry around this big briefcase full of bullshit like he [Woods] does?

OFFICER LINCOLN: I don't think I need to, do you?

THE DEFENDANT [OWEN]: No.

OFFICER LINCOLN: I think we're talking about something. We're talking about an event that took place. I know about it because I was there. You know about it because you were there. So why do I need a big sheaf of papers? We're both intelligent people with memories, am I right? How long were you outside the house, Duane? Hours? Minutes?

THE DEFENDANT [OWEN]: You guys got me good, man.

OFFICER LINCOLN: Yeah.

THE DEFENDANT [OWEN]: Yeah. I knew it, too.

OFFICER LINCOLN: Did you?

THE DEFENDANT [OWEN]: Yep. As soon as they asked me for footprints.

These excerpts show two things: First, that the conversations were two-way transactions, with both the officers and Owen trying to gather information. Owen was trying to learn how good a case the police had. Second, and more importantly, they show that Owen did not wish for questioning to cease; indeed, he wished for it to continue until he had made up his mind to end the game. It should be noted that his confession was not triggered by a particularly insightful or accusatory question. It is also important that this confession was hardly different from any other that Owen gave as to lesser crimes. There was no emotional breakdown, simply a statement of fact.

Under these circumstances, I would uphold the trial judge's denial of the motion to suppress which comes to us with a presumption of correctness. I believe that Owen's comments can fairly be understood as intending only to cut

off questioning on a particular subject and not a request to terminate questioning in its entirety.

EHRLICH, C.J., Concurs

An Appeal from the Circuit Court in and for Palm Beach County,

Richard B. Burk, Judge — Case No.84-4014-CF A02

Theodore S. Booras, West Palm Beach, Florida; Michael Salnick and Barry E. Krischer of Salnick & Krischer, West Palm Beach, Florida; and Duane Eugene Owen, in proper person, Starke, Florida,

for Appellant

Robert A. Butterworth, Attorney General and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, Florida,

for Appellee

TRANSCRIPTS FROM THE TRIAL

The trial court's findings and rulings on Appellant's Motions to Suppress. Record Excerpts pp. 1422-1445.

THE COURT: I will point out also that as I began this week, having reviewed the Miranda decision, I was clearly of the opinion that, "I don't want to talk about it," or, "I rather not talk about it," was an automatic triggering device, which, at that point, precluded further discussion with the confessant, absent some reinitiation by the confessant, separate and apart from any inquiry by law enforcement or people in that category.

The cases that have been furnished to me by the State, as well as the one furnished by the defense, although furnished from a different viewpoint or contention, convince me that the demand for an attorney may be automatic triggering device, and probably still is under Miranda.

But that the, "I don't want to talk about it," or that the, "I rather not talk about it," are matters which have to be examined in context. And once examined in context, then the determination has to be made as to whether or not they are equivocal, which would warrant law enforcement to making further inquiry to ascertain the equivocation and then with regard to that determination, once again, according to the case law that has been furnished to me, there must be a scrupulous adherence to the confessant's right to remain silent with regard to the matters being addressed.

I pointed out to you earlier today, and it is part of my discussion with you now, the matters that I had reviewed, I will not enumerate those items. But I will add to that litany the cases that the State has delivered to me, which I have now reviewed during the noon hour, that first of all the *Puccio v. State,* out of the First District in 1983, 445 S.2d 419. The *Breedlov v. State,* out of the Florida Supreme Court

in March of '82 at 413 S.2d on Page 1. *Sonny Boy v. State,* out of the Supreme Court of the State of Florida, February of '84, 446 S.2d Page 90. *State v. Beck,* out of the Third District in 1980 at 390 S.2d 748. *Harley v. State,* 407 S.2d at 382. *Harris v. State* out of the Supreme Court of the State of Florida, 1983, 438 S.2d 787.

Barneson v. State, out of the Third District in 1979, 371 S.2d at Page 680. I have not Shepardized any of these cases. I am relying upon both the State and the defense for representations in having furnished these cases to me that they are valid decisions which have not been overruled or superceded by some following case.

I began these proceedings being concerned about Mr. Owen's statement that he didn't want to talk about it, that he rather not talk about it. The contrast in speed between Sergeant, now Lieutenant McCoy and Sergeant Woods are similar, but Captain Lincoln's speed is more rapid than either of the two officers named.

A great deliberation for me is the issue of whether or not there was a scrupulous adherence to the right to remain silent once involved, if in fact it was invoked.

With regard specifically to the Slattery matters, which have been argued at great length by the State, with great emphasis placed on them, I have been encouraged by both the State and the defense to consider all of these matters in totality.

I pointed out to Mr. Owen at the beginning of this week that I felt that I knew him, certainly better than he knew me, by simply having observed him during some 20-some-odd hours of tapes.

Certainly the same relates to Officer McCoy, Officer Woods, and Officer Lincoln.

I have previously ruled, and reaffirmed that ruling with regard to the original arrest, that it was certainly on probable cause. I have denied at the earlier part of this week the defense motion with regard to that issue, the issue of free and voluntary, the threshold issue of the free, voluntary nature of the — all of the statements based upon my review of the tapes, of the testimony that has been presented in Court, as it relates not only to the video tapings, but also the original statements that were made orally to the officers back on the 30th of May and June, the first part of June, before they were video taped.

It is my determination that those rights were properly given to Mr. Owen to the point that after viewing the tapes and even hearing at one point the suggestion by Mr. Owen that either the officer or Mr. Owen could do them from memory, a factual finding by the Court at this time, therefore, is that the rights were appropriately advised to Mr. Owen; that he fully understood the right that we refer to as the Miranda rights, which are actually the constitutional rights that Miranda defines the proper procedure for giving.

And further, that he freely and voluntarily talked with law enforcement throughout the course of these proceedings, insofar as it relates an understanding that he had a right to remain silent, and what would happen if he didn't, and that he had the right to have a lawyer, and that one will be made available for him at state expense.

* * *

A factual finding by me at this time is that there was no physical coercion, there was no physical duress on Mr. Owen. There are not threats of violence on him. There were no suggestions of violence to him, in my observation of the tapes; he was in the room that he was in, in the corner that he was in, because that is where the television camera was pointed. I did not find during my entire viewing of the tapes any discomfort, although I would have been uncomfortable

if I had been siting in one of those metal chairs, but I found no discomfort or any other people sitting on those chairs, even though they were in them, what would seem to me, for a long period of time. I found, as a matter of fact, no preclusion of the normal bodily functions, either eating or sleeping or rest room facilities being denied to him that would place him in a physically discomforted position.

I further find, as a matter of fact, with regard to these matters, that a substantial portion of the discussions between Mr. Owen and law enforcement were at Mr. Owen's request, or invitation, and that even applies to the session when Mr. Owen was read the Probable Cause Affidavit, I believe, with regard to the Worden homicide, that Mr. Owen had requested the officers that should charges be filed, that he be advised. And it was in compliance with that request that the officers scheduled a meeting with Mr. Owens and read him that Probable Cause Affidavit.

As a finding of fact, I view throughout the discussions an intelligent and astuteness on Mr. Owen's part with regard, not only the legal ramifications of what he was doing, but also a complete continuation of what he referred to as maneuvers, or what can be put in the context of somebody who does not become a policeman, but is enamored enough with that activity to take up the opposite of that as a challenge or as a competition. It has been referred to as a game by the officers. I don't recall specifically whether or not it had been referred to as a game by Mr. Owen, but clearly it was a mental activity on Mr. Owen's part, as law enforcement.

But Mr. Owen's inquiries, as a finding of fact at this time, were a constant test to law enforcement, to see whether or not law enforcement had dotted the "I's" and crossed the "T's" with regard to the matters that Mr. Owen was involved in.

My finding of fact with regard to Mr. Owen's statements with regard to the more serious of his offenses are that he placed a higher challenge or a higher goal on getting the information with regard to those than he did with regard to the lesser charges against him, and as a necessary corollary he required of law enforcement a higher standard or a higher burden with regard to the proof to him of those particular issues.

As a factual determination made by me at this time, Mr. Owen was clearly aware of — is still aware of the penalties involved in the charges that are involved in his cases. That was clear during the taped interviews. It was clear during the testimony that has been presented with regard to this week's hearing.

* * *

[I]t is clear and convincing to me that there was no physical discomforture foisted upon Mr. Owen with regard to these matters. There was no threat of physical violence or any threats of any kind. There were no problems as acknowledged by Mr. Owen, and as acknowledged by the law enforcement officers. There was no suggestions that we are going to get you a better deal. Everybody was straight up front with each other.

Mr. Owen, through his discussions with the officers, I believe was straight up front with them to the extent that if you can prove it to my satisfaction, I will discuss the matters with you. But that was the challenge that he placed to them, and upon receiving the necessary input back to him as to what they had done, that he determined whether they had met his burden, and if they had, then he'd discuss the matters with them. He deliberately tested them and sent them on some wild goose chases for the purposes of seeing if they were doing what he expected them to be doing when the results came back in and he weighed and evaluated those very carefully. If I had seen, as the State has positioned

the matter, if I had seen just the one tape with regard to what has been designated now, I guess, as the Delray Beach, I guess the case where the Karen Slattery matter occurred, in Delray, if there had been just one tape by itself, it would have been substantially different. It is not the one tape by itself. If Captain Lincoln had been doing all of the inquiries, I don't know that the same result would have come about. But at least contrast between Captain Lincoln and Lieutenant McCoy would not have been as substantial as it was.

I pointed out previously and make the factual finding of fact at this time that Lieutenant McCoy's approach was unquestionably laid back.

You have referred to that as the friend or good-guy approach, Mr. Krischer, with regard to those matters. I don't find anything in the cases that addresses itself to prohibiting that type of inquiry.

I have gone back and I have looked at the Miranda decision again, and although they talk about the Mutt-and-Jeff and the false-friend as a determination of law, I do not find that that is precluded.

* * *

I may be completely misjudging Lieutenant McCoy, but I don't believe so. There is no question but that he arrived to talk to Mr. Owen as a law enforcement officer. Neither he nor Mr. Owen had any question in their mind but that that was the case. But I believe that Lieutenant McCoy had an earnest interest that we have referred to here of having on the hat of either the prison confessor or the bartender. I think he had an earnest interest in assisting Mr. Owen in getting some of these matters off of Mr. Owen's chest, separate and apart from — and certainly subordinate to his activity as a law enforcement officer in getting these statements.

He certainly did not come in and say, "If you want to confess, I will hear your confession, and I will not use it for anything." I don't believe he had to, under the circumstances, acknowledge to Mr. Owen that Lieutenant McCoy was in fact a law enforcement officer, and the challenge was there. Had he been a priest, Mr. Owen would not have talked to him. The charge was not to test the priest. The charge was to test the law enforcement officer to see if he came up with the right answers to the questions, in effect, Mr. Owen had presented to him.

* * *

Now, with the difficulty coming into these hearings that I have had during these hearings, is the matter with regard to whether or not the discussions should have been terminated once Mr. Owen says, "I don't want to talk about it." Once he said, "I rather not talk about it," those matters, by a preponderance of the evidence, to me, would not give me as much difficulty, perhaps, if Captain Lincoln had more patience with — had more patience with regard to these inquiries than to wan to address them with the rapidity in which he did. I believe with regard to his inquiry, that may be pointed out, or pointed up so much simply because of the contrast between his approach and that of Lieutenant McCoy. But my view of these tapes leads me in my determination by a preponderance of the evidence to follow what the State has posited; she may not have put it in exactly those words, but I think two things problemed Mr. Owen with regard to those matters when he said, "I don't want to talk about it. I rather not talk about it."

I will say at the outset I do not believe that he was problemed or concerned in any way attempting to consciously or subconsciously to invoke his constitutional right to remain silent. I think what he was doing was twofold: Number one, he was weighing, he was being pushed more rapidly than he had been pushed with regard to the previous

matters to make a decision with regard to whether or not: "We have got enough here to convict you, Duane Owen." He was weighing those matters.

As I recall that tape, he got back into a great deal of consideration and discussion; he had his socks on at the time that he was supposed to have walked through that blood, and he had a puzzled situation as to how that print would have been left if he had his socks on . That wasn't discussed on the tape, but that was a problem that was puzzling Duane Owen. So he was equating, he was sifting, he was running through his mental computer the evidence that had been presented to him. And without doubt, and perhaps on equal plane with that was his simple, although Anglo-Saxon-worded statement, "You just don't confess to shit like that," which placed the significance of it in his mind, and it was not in my determination at this time an effort to exercise, although I am certain that there can be people who can view that tape dispassionately as I have tried to do, that may come to a different conclusion.

I believe that he was weighing other matters separately apart from any articulated or unarticulated exercise of the right to remain silent.

The case law that you furnished to me is replete that it doesn't — that you don't view it from a standpoint of a legal scholar whether or not that exercise has been made. The person doesn't have to be a lawyer to phrase the statement, "I want to exercise my constitutional right to remain silent." These cases are replete with that. I don't believe that is what he was doing; I don't believe that he was even attempting to exercise the right to remain silent with regard to those issues. I think he was computing, he was being pushed, unlike Lieutenant McCoy, Captain Lincoln was pushing him to make a decision, and that is not the way Duane Owen operated throughout these proceedings. He wanted to take

his pencil and paper; he wanted to go back and calculate; he wanted to determine in his mind what these people have, the evidence.

I believe that he ultimately determined in his mind, more rushed than he would like to have been, that he did, in fact, have that to the point that he decided to talk about it, and did, in fact, talk about it.

These matters that I have indicated here on the record, coupled with the recitation with regard to these matters what I have reviewed will constitute my finding of fact with regard to these taped statements as well as to those that were not taped.

All the matters addressed by the Motion to Suppress are being denied by me at this time based upon a finding of fact and conclusion of law that I have neither eloquently nor, perhaps, in logical sequence laid out for you.